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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 321

LELA MAE BENSON, ADMINISTRATRIX, *Petitioner*

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, *Respondent*

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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INDEX

AUTHORITIES

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Respondent submits that the history of this cause in the Courts of the State of Texas, as reflected on pages 1-4 of the Petition, is correct. However, in making this admission, Respondent does not agree with or admit the force of any of the argumentative statements made by Petitioner in the narration of the proceedings had in the Courts of Texas and contends that there was no error com-

mitted which in any manner deprived Petitioner of any right under the Federal Employers' Liability Act, Title 45 USCA, Section 51, et sequitur.

Respondent further submits that the opinion of the Court below (R. 45-55), reported in Volume 200 SW (2d) 223, correctly disposes of all issues in the cause and that such opinion needs no bolstering, amplification or explanation from Respondent. (In reply to statement of Petitioner upon the decision and judgment of the Court below as appears on pages 4-9 of the Petition)

REPLY TO THE PETITIONER'S STATEMENT WITH REFERENCE TO THE NATURE OF THE CASE AND SUMMARY OF THE MATTER INVOLVED

Respondent respectfully directs the attention of the Court to the fact that a reading of Petitioner's first amended original petition, upon which the cause was tried and submitted to the jury in the Trial Court (R. 1-8), does not set forth a plausible or a logical theory upon which any claim of legal liability could be based; it does not explain the manner in which the deceased met his death nor the cause of the death of the deceased. These matters are not referred to upon a question of insufficiency of the pleading, but merely to reflect that the entire record, including the pleading, is utterly devoid of any facts upon which a finding of proximate cause against Respondent could be based. This statement is made at

this point to demonstrate that a reading of such pleading still leaves the defendant and the trier of the facts in a state of doubt, uncertainty and conjecture with regard to that which it is claimed that the Respondent did or failed to do which could have caused the death of the deceased. As heretofore stated, a reading of the entire record reflects that same doubt for the reason that it establishes no facts from which a rational or logical explanation of the cause of the tragedy could be reconstructed. As will be pointed out later, even though the jury was allowed to delve into the field of conjecture, supposition and speculation, it still found no act of the Respondent which was a proximate cause.

Respondent also respectfully submits that the statement of the nature of the case appearing on pages 9-31 still leaves the cause of death and the manner in which such occurrence happened in a state of doubt, confusion and uncertainty, to such an extent that there is no reasonable or logical basis for a finding that Respondent caused his death or that in the exercise of due care it could have reasonably foreseen that he would meet his death at such time and place.

In the absence of a factual basis upon which proximate cause might be reasonably based, there is no case proved such as imposes liability and, under the decisions of this Honorable Court, the judgment of the Court below is correct. Attention is further directed to the fact that no-

where in the Petition, or in the Brief in support of same, does Petitioner attempt to demonstrate from the facts in evidence whether the deceased met his death by being struck by the eastbound Train No. 372 or the westbound train No. 381 as it pulled up approximately a car length after train 372 had passed. Likewise, no plausible explanation is made for the presence of deceased between the tracks at the time of the approach of train 372, the eastbound train, which train he and all other employees present knew was due to arrive at 3:15 A.M. The uncontroverted record reflects that deceased's presence there was contrary to the safety rule which required him to be in a position of safety upon the approach of another train. (R. 30-31)

As heretofore pointed out, even in the field of speculation, conjecture, supposition and guess work the jury found no act of negligence on the part of Respondent which proximately caused the death of deceased. (R. 35-43)

The Court below based its judgment upon two grounds:

1) The verdict of the jury which found no act of proximate cause.

2) The insufficiency of the evidence to sustain a finding of proximate cause against Respondent.

Such Court held that either ground entitled the Respondent to judgment in this cause. The situation is precisely the reverse of that which confronted the Court in

the cases cited by Petitioner. In such cases cited the Court below had set aside the verdict of the jury in favor of the petitioner. In this cause the Trial Court and the Court below held that the Respondent was entitled to judgment upon the verdict.

JURISDICTION

Respondent makes no contention that this Honorable Court cannot exercise jurisdiction over the cause; it respectfully insists that in the proper exercise of judicial discretion, such jurisdiction should not be entertained for the reason that the judgment of the Court below was in all things correct.

REPLY TO PETITIONER'S QUESTIONS PRESENTED AND REASONS RELIED UPON

(Pages 33-43 of Petition)

Respondent submits that such reasons and the questions presented do not properly reflect the record and the issues which were decided by the Court below, in that no act of negligence which was a proximate cause was found against Respondent. (R. 35-43) While the record does reflect that the jury found in answer to a general finding that sixty per cent of the negligence of Respondent proximately contributed to cause the death of deceased, such a finding became immaterial because it is controlled and wiped out by the specific findings in answer to Special

Issues Numbers 3, 13, 16, 19 and 20, (R. 35-42) which jury findings acquit the Respondent of any negligence which was a proximate cause. There is no contention that the evidence was not sufficient to support such findings of no proximate cause and, therefore, the judgment of the Court below was in all things correct, because it rendered judgment upon the controlling findings and disregarded a general finding which was unsupported by the evidence and, therefore, in no manner controlling.

REPLY TO THE BRIEF IN SUPPORT OF THE PETITION

(Appearing on pages 43-83)

In reply to that portion of the Brief styled III, beginning on page 47 thereof, Respondent again directs the attention of the Court to the entire verdict of the jury (R. 35-43), which finds no act of negligence upon the part of Respondent which proximately caused the death of the deceased. There were three issues upon the negligence of Respondent submitted to the jury. 1) In the manner of laying out and maintaining its main line and passing tracks and area between same; 2) Whether the engineer of the westbound train started said train without giving any signal or notice; 3) Whether the signal given was sufficient. The jury found that the manner of laying out and maintaining its main line and passing tracks and the area between the same was negligence,

but it found that such negligence was not the direct and proximate cause. In this connection, Respondent submits that this answer upon proximate cause was the only answer under the record which could have been given, because there was no evidence from which it could be logically inferred that the manner of laying out and maintaining the tracks caused the deceased to be on the main line track or in the area between the main line and passing tracks at the time of the approach of the eastbound train, which he knew was due to be there at 3:15 A. M. Therefore, since the jury rightfully found no responsible negligence upon the part of Respondent, the answer of the jury to a general issue upon contributory negligence, which issue was conditioned upon joint responsibility, became immaterial and of no controlling force and effect.

The undisputed record reflects that the deceased was violating a rule of safety in being between the tracks or on the main line track; therefore, as a matter of law the rule of a comparison of negligence is not applicable, even though there was any issue for the jury. In support thereof Respondent quotes from the case of *Great Northern Railway Company vs. Wiles*, 240 U.S. 444; 36 Supreme Court, 406; 60 Law Edition, 732:

> "* * * The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles,

—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasuralble liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have full and an anxious sense of responsibility.

"In the present case there was nothing to extenuate Wiles's negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

Respondent wishes at this point to take issue with any inference contained in the second paragraph on page 47 to the effect that the Respondent was maintaining any character of yards at the scene of the accident. There is no such evidence in the record and the uncontradicted evidence reflects that a passing track and a main line track

were all that were maintained at the scene of the accident and that such tracks were out in the open country. In support thereof, reference is made to the photographic exhibits appearing on pages 76-80 of the Record.

REPLY TO THE SPECIFICATION OF ERRORS

(Appearing on pages 50-51 of the Brief)

Respondent respectfully requests consideration of the following Counter Points in reply to the errors specified by Petitioner and the argument and authorities submitted thereto. These Counter Points are related to each other and will, therefore, be argued together.

COUNTER POINT NO. 1

The record reflecting that there is no finding by the jury which would convict the Respondent of proximate cause, the Court below correctly and properly disregarded a general unsupported finding upon comparative contributory negligence. (In reply to all Specifications of Error appearing on pages 50-51, argued on pages 51-83 of Petitioner's Brief)

COUNTER POINT NO. 2

The record reflecting that there is not sufficient evidence to sustain a finding of proximate cause against Respondent, the judgment of the Court below was in all things correct. (In reply to all Specifications of Error

appearing on pages 50-51 of Petitioner's Brief, argued on pages 51-83 thereof)

The Court below has held that the Respondent was entitled to judgment upon two grounds: First, that the finding upon an issue which was general and uncontrolling was immaterial in view of the finding of no proximate cause; and second, there was not sufficient evidence in the record to support a finding of proximate cause and, therefore, there existed no controverted issue of fact for submission to the jury.

This Court is not concerned with the form or the manner in which the issues were submitted to the jury, since there is no requirement of a jury trial under the Constitution of the United States. It is concerned with the sufficiency of the evidence to sustain the verdict and the judgment rendered thereon. For a statement of the applicable rule, Respondent quotes from the case of *Brady v. Southern Ry. Co.*, 64 Supreme Court, 232, 234 and 235; 320 U. S. 477, 479-480; 88 Law Edition, 239 (1943):

> "* * * The weight of the evidence under the Employers' Libility Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. Western & Atlantic R. R. v. Hughes, supra; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 45 S. Ct. 169, 170, 69 L. Ed. 419. Cf. Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720; Commissioners v. Clark, 94 U. S. 279, 284, 24 L. Ed. 59. When the evidence is such that without weigh-

ing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077; Pence v. United States, 316 U. S. 332, 62 S. Ct. 1080, 86 L. Ed. 1510; Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419, noted; Anderson, Adm'x, v. Smith, 226 U. S. 439, 33 S. Ct. 176, 57 L. Ed. 289; Coughran v. Bigelow, 164 U. S. 301, 307 17 S. Ct. 117, 119, 41 L. Ed. 442; Gunning v. Cooley, 281 U. S. 90, 93, 50 S. Ct. 231 232, 74 L. Ed. 720, note; Seaboard Airline Ry. v. Padgett, 236 U. S. 668, 673, 35 S. Ct. 481, 482, 59 L. Ed. 777; Parks v. Ross, 11 How. 362, 373, 13 L. Ed. 730. See IX Wigmore on Evidence, (3d ed., 1940), Paras. 2494 et seq.

An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies. However, the soundness of the judgment entered in the state Supreme Court depends upon an appraisal of the evidence and, as to this, there is a difference of opinion here. Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer."

Without admitting that there exist sufficient probative facts in the record to warrant the submission of this cause to the jury, Respondent submits that the jury has found the existence of no proximate cause; If the evidence is sufficient to sustain a finding of proximate cause, as Petitioner contends, then it is certainly sufficient to sustain a finding of no proximate cause and the one finding is as binding as the other. In support thereof Respondent quotes from two recent decisions of this Honorable Court.

Tennant v. Peoria & P. U. R. Co., 321 U. S. at pages 32, 33, 64 S. Ct. at page 411, 88 L. Ed. 520:

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458; * * *."

Lavender v. Kurn, 327 U. S. at page 653, 66 S. Ct. at page 744, 90 L. Ed. 421.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evdentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary

basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Since the jury found the existence of no proximate cause, there is no basis for a finding of sixty per cent contributing proximate cause. Until the proximate cause is established by evidence of probative force, there can be no contributing proximate cause and, as heretofore pointed out, the findings upon proximate cause destroyed the finding upon contributing proximate cause in answer to Special Issue No. 12. In this connection Respondent wishes to correct any statement in Petitioner's Brief to the effect that Special Issue No. 12 was submitted in the language requested by Respondent. The record reflects that the Trial Court refused such requested issue in the language submitted by Respondent, because Respondent requested such issue without waiving its claim that the evidence did not justify the submission of any matter or issue of fact to the jury and also its claim that in law the negligence of the deceased was the sole cause of the injury. (R. 34)

As heretofore pointed out, by the quotation on page 7 hereof from the case of *Great Northern Railway Company vs. Wiles*, 240 U. S., 444; 36 Supreme Court, 406; 60 Law Edition, 732, which case holds that contributory negligence or comparative negligence is not an issue in the cause when an employee violates a rule of safety which the rail-

road has a right in the exercise of ordinary care to expect him to obey. In this cause the only duty which rested upon the deceased was to place himself in a position of safety and certainly he was violating that rule in being between the tracks or on either the main line track or the passing track at the time of the approach of train 372, the eastbound train. Certainly the Respondent could not furnish a safe place in the path of an on-rushing train or in close proximity thereto. Especially is this true when the uncontroverted record reflects that he was performing no duty whatsoever there and had no duty to perform for over fifteen minutes prior thereto. (R. 18) Also the jury found that deceased was engaged in no specific duty after he had completed his duties with respect to an inspection of the train. (R. 42) Certainly these facts conclusively prove that the finding of negligence in laying out and maintaining the main line track, the passing track and the area in between, which negligence was not a proximate cause, also proved conclusively that such negligence could not be a contributing proximate cause to the extent of sixty per cent, or any other percentage. Such a condition could have in no manner caused or contributed to cause the deceased to be in a place where the Respondent could not in the exercise of due care have expected the deceased, to be. In other words, the condition of the tracks or the area between the same in no manner caused him to be in such place, when, in the exercise of due care, he should have been in a position of safety and had fifteen minutes in which

to get in such a position. In support thereof, Respondent cites the case of *Delaware, L. & W. Railway vs. Koske*, 279 U.S. 7; 49 Sup. Ct., 202; 73 Law Edition, 578. It was correctly held in the case of *Alabama Great Southern RR. Co. vs. Davis*, Supreme Court of Alabama, 1944, 18 So. (2d) 737; 246 Ala. 64, certiorari denied in 65 S. Ct., 676; 324 U.S. 846; 89 Law Edition, 407, that the question of contributory negligence could not be involved in the absence of an act of negligence on the part of the defendant which was a proximate cause. This rule applies to the present controversy because there are no facts upon which a finding of proximate cause could be based and also because the jury found that there was no act of Respondent which proximately caused the death of deceased. The facts in such above cited case were much more substantial and forceful towards a finding of proximate cause, but the Court held that speculation was required to determine this issue and, therefore, no basis existed. We quote from such case on page 742, as follows:

> "* * * It was a warning to stay out of danger from a back up. If Davis did not catch the signals given by Atkinson, there is no reason to find that the signal given by the engineer was not sufficient warning to him. If Davis did not hear it on account of the noise of the southbound train, the other trainmen had no way of knowing that. This same southbound train was then passing Atkinson and Cagle also, and had the same tendency to obstruct their

hearing, but they did hear it. Why should it not be sufficient for Davis?

"If Davis put himself on the track behind the train at that time, which we will not assume, he should not have done so after such warnings to him. The engineer's signal was warning to all the trainmen. If he attempted to catch the moving cars and slipped under them, this was not the proximate result of any negligence of the trainmen, so far as the evidence shows. It is difficult to imagine any other cause of his injury.

"The only question is whether proper signals were given of the intended movement. Davis was eight or ten car lengths nearer the engineer and to the engine whistle than Cagle and Atkinson, and they heard it with no better opportunity, and no one testified that it was not given in a way well understood by all trainmen. The situation simply shows a regretable incident for which the defendant is not responsible, since its duty to Davis was fully discharged.

"The affirmative charge should have been given for the defendant."

The same principles are applicable in this cause, where the deceased had at least fifteen minutes to place himself in a position of safety and failed to do so.

The Petitioner contends that the deceased was caught in the stock guard and that such instrumentality, which the Respondent was required to maintain by law, caused his death. Such contention is without evidence of any probative force to sustain it and it is contrary to the

facts in evidence. The uncontroverted evidence reflects that deceased's body was being pushed or dragged from the west towards the cattle guard for a distance of twenty-four feet and that his body was at least sixty-four and a half feet west of the cattle guard when found. (R. 24-25). The record also reflects that two gloves, which were cut in two by a passing train on the main line track, were found at a point three feet west of the beginning of the disturbance of the grass where deceased's body had apparently been dragged or pushed for twenty-four feet. (R. 23-24) The only reasonable or logical inference which can be drawn from such facts is that the tragedy was not caused by the stock guard. Just how or why it happened is a matter purely for speculation or conjecture, but certainly these facts do not prove that the stock guard, or the area between the same, caused or contributed to cause the death. Likewise, the bodily injuries which deceased suffered disprove any contention that the stock guard caused or contributed to cause his death. (R. 26) The torn shoe, the ripped trousers and shirt, which Petitioner strongly relies upon as proving such fact, can in no manner counterbalance the probative force of the above evidentiary facts; in dragging or pushing a body for twenty-four feet upon a railroad right-of-way, quite naturally trousers and shirt will be torn and ripped and also a heel on a shoe could get torn loose by its contact with the crossties or some other portion of the right-of-way. However, even if it be assumed that the deceased was in

the vicinity of the cattle guard at the time of the approach of the eastbound train, there is no explanation for his presence there or any showing with regard to any manner in which the Respondent could have foreseen that he would be present at such spot. The jury has found that he was performing no specific duty and if there was any issue of fact to be submitted to a jury, this finding is controlling and cannot be set aside.

The jury found negligence "in the manner of laying out and maintaining its main line and passing track and the area between the same * * *." (R. 37) As heretofore pointed out, it found that such negligence was not the direct and proximate cause. There is no reason advanced throughout the entire Petition and Brief as regards how, why or the exact manner in which the laying out and maintaining of the main line and the passing track and the space in between could have contributed sixty per cent, or any other percentage, as a proximate contributing cause, which caused deceased to be in between the main line track and the passing track or on the main line track, in violation of the safety rule of Respondent at the time of the approach of the eastbound train. The record does not even remotely support any theory upon which judgment could be rendered for Petitioner upon the finding in answer to Special Issue No. 12, because there are no facts to support a finding of proximate cause and, therefore, there can be no proximate contributing cause on the part of Respon-

dent. From the facts in evidence, the only logical and reasonable answer which can be given is that as a matter of law the manner of maintaining the tracks, and the area between the same, could have in no degree proximately caused the tragedy and, therefore, as a matter of law such action could not have proximately contributed to cause such tragedy. The Courts below held that Special Issue No. 12 was a general finding, which was rendered nugatory by the findings of the jury upon specific issues which found no proximate cause; and also because there was no evidence in the record to support a finding of proximate cause. Without a repetition of authorities cited by the Court below in support of its ruling to the effect that such special issue was of no force and effect. Respondent respectfully refers the Court to them. (R. 50) The Courts below were further justified in ignoring this answer of sixty per cent contributory negligence, because the evidence was insufficient to sustain such finding or, as has been previously pointed out. any finding upon proximate cause.

CONCLUSION

Respondent respectfully insists that the judgment of the Court below was in all respects correct; that Petitioner has been deprived of no right whatsoever under the Federal Employers' Liability Act, because the record reflects, without the necessity of further investigation, that the

evidence was in all respects insufficient to sustain any judgment in favor of Petitioner; that the record also reflects that the verdict upon such insufficient evidence acquitted the Respondent of any negligence which was a proximate cause; and for both of these reasons Respondent submits that the Petition should be denied and in duty bound it will ever pray.

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O. O. Touchstone, one of duly authorized and admitted Counsel for Respondent, Missouri-Kansas-Texas Railroad Company of Texas, duly certifies that he has duly delivered to J. W. Hassell, counsel for Petitioner, a true and correct copy of this Brief in Opposition to the granting of a Writ of Certiorari, at his office in the Magnolia Building, Dallas 1, Texas, prior to the filing thereof in the Supreme Court of the United States.

O. O. Touchstone